No. 89-1680

In The

Supreme Court of the United States

October Term, 1989

TRUSTEES OF BOSTON UNIVERSITY,

Petitioner,

v.

JULIA PREWITT BROWN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION FOR THE RESPONDENT

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RESPONDENT'S STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether a federal court may, as an appropriate exercise of its discretion to remedy violations of Title VII, award tenure to a Title VII plaintiff whose tenure application was rejected by a university's president and trustees because of her sex.

2. Whether, in a civil case, a "beyond a reasonable doubt" standard of harmless error analysis should be applied to evidentiary errors involving university administrators' public comments on topics of general or academic interest, where it is offered that such errors may have a chilling effect on these individuals' speech.

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STATEMENT OF THE CASE

This case arises out of the denial of tenure to Julia Prewitt Brown ("Brown"), an assistant professor of English Literature, by the petitioner, Trustees of Boston University. Brown's amended complaint as tried in the district court included three counts, Count I for breach of a provision of a collective bargaining agreement barring discrimination, Count II for violation of Title VII of the 1964 Civil Rights Act, 42 U.S.C. 2000e *et seq.*, and Count III for violation of the state anti-discrimination law, Mass. G.L. c. 151B.

Count I of the complaint was tried to a jury, which found that the Trustees had denied Brown tenure because of her sex[1] and awarded monetary damages. The court adopted the jury's findings as to issues common to Count I and Counts II and III. Thereafter, in addition to awarding monetary damages,[2] the court ordered Brown's reinstatement to Boston University as a tenured associate professor.

The Trustees appealed to the First Circuit Court of Appeals, raising challenges to the district court's jurisdiction, evidentiary rulings, jury instructions, and remedy. The court of appeals rejected several of these arguments because the Trustees had failed to raise them in a timely fashion. It agreed that certain of the district court's evidentiary rulings were in error, but in each case found the error to be harmless. Pet. App. 20a-23a, 26a-29a. After evaluating the various evidentiary challenges, the court of appeals concluded that Brown had made a showing of discriminatory treatment "so compelling as to permit a reasonable finding of one-sidedness going beyond a mere difference in judgment," and that a reasonable jury could properly have found that "the denial of tenure to Brown was 'manifestly' unequal" given the evidence of Boston University's tenure standards and awards of tenure to similarly situated male faculty. *Id.* at 18a-19a.[3] It also

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[1] The jury also found that the Trustees had not retaliated against Brown for her participation in a faculty strike, a second aspect of her contract claim.

[2] The district court also ordered other equitable and compensatory relief not presently at issue.

[3] Petitioner's twelve-page statement of the case in its petition mischaracterizes the evidence introduced at trial and

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ruled that tenure was the only remedy which would not perpetuate the past discrimination, because Boston University's offer to extend Brown's contract and reconsider her for tenure had itself been held to be discriminatory. *Id.* at 49a.

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dwells on matters not relevant to the petition, essentially repeating arguments raised unsuccessfully in the court of appeals and not pressed here, in an apparent effort either to call into question the finding of liability or to predispose the Court against Brown on the question of the remedy of tenure.

For example, the petition states (Pet. 9) that at trial Brown "presented the jury with evidence to demonstrate the strength of her qualifications for tenure" relying "in substantial part" on the testimony of two colleagues (Professors Goodheart and Craddock) whose testimony involved opinion evidence later deemed improperly admitted. The implication is that the bulk of Brown's case consisted of improperly admitted evidence. This is untrue in two respects: the central body of evidence Brown presented consisted of *comparative* evidence regarding Brown's qualifications and those of male faculty awarded tenure, *see* Pet. App. 11a-12a, 18a; and although Professors Goodheart and Craddock testified at great length, the court of appeals found that only two lone remarks were improperly admitted, and that these were repetitive of other properly admitted evidence. *Id.* at 21a-23a.

Similarly, petitioner maligns Brown for being the only tenure candidate between 1979 and 1985 to have rejected a three year extension of contract in lieu of tenure (Pet. 7, n.4), neglecting to mention that three faculty committees emphatically rejected the appropriateness of a contract extension as an alternative to tenure in her case before she responded to the offer. Pet. App. 7a-8a.

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The court of appeals affirmed the district court's tenure award as an instance of the appropriate exercise of courts' "broad discretion to fashion 'make whole' remedies" for violations of Title VII. *Id.* at 49a-50a. Contrary to petitioner's assertion, the court of appeals did not establish an automatic entitlement to a judicial award of tenure to all Title VII plaintiffs who successfully challenge a tenure denial, but rather addressed the particulars of plaintiff's case.

Petitioner requested rehearing on three grounds, two of which the court of appeals rejected as untimely raised. *Id.* at 55a-59a. The court of appeals also rejected the remaining argument, that the court failed to consider the cumulative effect of four evidentiary errors, including the two errors that are the subject of the second question raised in the instant petition. Stating that it had held in each case "essentially that any effect on the jury would be negligible," the court of appeals explained that the cumulative impact of the errors "would in all likelihood have not affected the jury verdict." *Id.* at 55a. The Trustees made no argument regarding the standard to be

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The list of irrelevant matters in petitioner's statement could go on to include petitioner's recitation of its other evidentiary arguments rejected by the court of appeals, its selective quotations from the tenure file and from the district court's jury instructions, its gratuitous comments on the significance of various items of trial evidence, and its suggestion of impropriety in the jury's deciding issues common to the legal and equitable claims. These matters are not properly before this Court. As is apparent from its lengthy opinion, the court of appeals carefully and thoroughly reviewed each of the Trustees' arguments before affirming the finding of liability.

applied to evidentiary errors potentially implicating constitutional rights.

REASONS TO DENY THE PETITION

Although petitioner claims otherwise, the decision below awarding tenure as a remedy for a discriminatory denial of tenure does not present a conflict with the decision of the Sixth Circuit or any other circuit court. The First Circuit did not issue a blanket rule mandating that tenure be awarded as the required remedy in such cases, but merely approved the district court's tenure award as an appropriate exercise of discretion. The Sixth Circuit's guidelines for tenure cases would allow for a similar remedy on facts paralleling those in Brown's case. Pp. 6-15, *infra*.

Nor does the tenure award infringe upon any constitutional right of petitioner, since the findings below establish that petitioner's denial of tenure to Brown was based on her sex, and that petitioner's defense based on Brown's supposedly inadequate scholarship was a pretext for discrimination. There is no constitutional right to discriminate, under the guise of "academic freedom" or otherwise. Pp. 15-18, *infra*.

This case is not a proper vehicle for this Court's consideration of the standard to be applied in civil cases to the analysis of harmless errors in a district court's rulings which may implicate constitutional rights. That issue is untimely raised for the first time in the petition for a writ of certiorari. Moreover, any burden that may be placed on constitutional rights on the facts presented

below is incidental and speculative, and is not buttressed by any finding that a violation of constitutional rights occurred. Finally, the issue of the proper harmless constitutional error standard in civil cases has not given rise to any reported decisions, much less a conflict among the lower courts, and is therefore not the sort of significant issue that would warrant the Court's attention at this time. Pp. 18-22, *infra*.

In sum, the decision below raises no issue on which there is a clear conflict among the circuits or other lower courts. Nor does it raise any issue of a pressing nature, such as might now justify review by this Court. Rather, the decision below is a careful and correct application of well-settled law to the particular facts of the case before it.

I. THE DECISION OF THE FIRST CIRCUIT COURT OF APPEALS DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT

A. The First Circuit Stated No General Rule Requiring Tenure

The First Circuit's decision below does not state a general rule that tenure should be conferred on every Title VII plaintiff who successfully challenges a tenure denial. Rather, it addresses the particular remedy fashioned by the district court in response to the specific facts of Brown's case. Pet. App. 47a-50a.[4] The Court's words

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[4] Notably, the First Circuit stated that "The conclusion that tenure is *an* appropriate Title VII remedy is borne out by the statute's legislative history." Pet. App. 49a (emphasis

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are as follows (with emphasis on Brown supplied): "We turn now to the matter of the district court's order that the University reinstate *Brown* with tenure." *Id.* at 47a. "We see no reason to deny *Brown* such 'make whole' relief here." *Id.* at 48a. "Some *amici* suggest that *Brown* be reinstated for a three year probationary period, or be subjected to a nondiscriminatory tenure decision. . . . [T]hese suggestions fall short of remedies which will make *Brown* whole. According to the jury's verdict, *she* was offered the three year extension *because* of discrimination. The jury found that, 'but for' sex discrimination, *Brown* would immediately have been granted tenure. Awarding *her* tenure is the only way to provide *her* the most complete relief possible." *Id.* at 49a. "We add that *Brown's* near unanimous endorsement by colleagues within and without her department suggests strongly that there are no issues of collegiality or the like which might make the granting of tenure inappropriate." *Id.* at 50a.

The decision does nothing more than approve the district court's exercise of its unquestioned discretion, *see Franks v. Bowman Transportation Co.*, 424 U.S. 747, 763-64 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 424-25 (1975), to formulate an appropriate remedy for proven discrimination.[5] But, by quoting the First Circuit as

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supplied). The court of appeals did not say tenure is *the* only appropriate remedy where a plaintiff proves that he or she was denied tenure because of discrimination, and in fact suggested the contrary in intimating that "issues of collegiality or the like . . . might make the granting of tenure inappropriate" on different facts. *Id.* at App. 50a.

[5] The district court noted in its decision that "the parties agree, correctly, that the question of reinstatement is addressed

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supposedly having said that "[a]warding [a successful Title VII complainant] tenure is the *only* way to provide her the most complete relief possible" (*see* Pet. 19) – where the Court of Appeals never spoke of the generic "successful Title VII complainant" but only of Brown herself (*see* Pet. App. 49a) – petitioner fabricates a general rule where none exists.

B. Even Under the Sixth Circuit's Guidelines, Brown Was Entitled to Tenure as a Remedy

There is no conflict between the First Circuit's approval of a tenure award for Brown and the guidelines issued by the Sixth Circuit, because Brown's is the sort of exceptional case contemplated by those guidelines. In the First Circuit, any tenure case which survives the court of appeals' review is exceptional, since the court of appeals' requirements for a finding of liability in a tenure challenge are so demanding. In fact, Brown is the first prevailing plaintiff in a First Circuit tenure case to have survived the court of appeals' review. *See Kumar v. Board of Trustees*, 774 F.2d 1 (1st Cir. 1985), *cert. denied*, 475 U.S. 1097 (1986) (reversing district court decision that university discriminated); *Fields v. Clark University*, 817 F.2d 931 (1st Cir. 1987) (vacating reinstatement of professor and order of new tenure review where district court had misplaced burden on plaintiff to prove that absent discrimination she would have been tenured, where case

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to the sound discretion of the court. . . . [O]ur court of appeals has warned us to be more circumspect in tenure cases than in other cases." Pet. App. 67a.

involved direct evidence of discrimination). The Sixth Circuit announced its guidelines for equitable remedies for prevailing plaintiffs seeking tenure in a case markedly different from *Brown* both in its procedural posture and its facts. In *Gutzwiller v. Fenik*, 860 F.2d 1317 (6th Cir. 1988), the court of appeals reversed the ruling of a district court that had not only failed to award tenure, but had also erroneously declined to adopt for purposes of Title VII liability a binding jury verdict finding liability for discrimination under 42 U.S.C. § 1983. 860 F.2d at 1333. Thus, unlike the First Circuit in *Brown*, the Sixth Circuit was not called upon to evaluate the propriety of an existing tenure award.

The facts in *Gutzwiller* virtually invited the remedy of reinstatement and a new tenure review by an impartial faculty committee. There the only discriminatory actors were two faculty members at the department level (860 F.2d at 1325-27); the school's administrators were found not to have discriminated. *Id.* at 1323-24. Furthermore, a faculty grievance committee, which agreed that the plaintiff's tenure review had been conducted unfairly, recommended that she be reinstated for a year and reviewed again by a newly constituted committee. *Id.* The facts in *Gutzwiller* appropriately convinced the Sixth Circuit that the plaintiff there might be able to receive a fair review if the case were reconsidered by the university. Nonetheless, the Court of Appeals acted cautiously in leaving the determination of the likelihood of fairness to the trial court. *Id.* at 1333.

The factual background of Brown's case differs significantly both as to the locus of the discrimination and

the extent of her favorable support.[6] Brown was fully and favorably reviewed at five of the seven levels of the tenure process.[7] The departmental faculty committee voted for her by a vote of 22-0, an unusual show of strength in that department. Pet. App. 5a, 12a n.6. The college-wide faculty committee recommended her unanimously. *Id.* at 5a. The dean recommended her for tenure (with reservations). *Id.* at 6a. The university-wide faculty committee recommended tenure by a vote of 9-2. *Id.* at 6a-7a. The provost then offered a three year contract extension followed by a new tenure review, an offer that, according to university procedures, required the concurrence of all the faculty committees as well as the candidate. Each of the three faculty committees unanimously rejected the provost's extension offer and reasserted in each case the propriety of an immediate tenure award. *Id.* at 7a-8a. The provost then offered to promote Brown to associate professor if she would accept an extension of

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[6] Petitioner dissimulates by stating (Pet. 17) that *Gutzwiller* involved "a factual record virtually identical to the record in this case." The only factual similarity between the two cases is that each of the plaintiffs was held to a higher standard than her male counterparts in being expected to publish a second book in order to earn tenure. *See Gutzwiller*, 860 F.2d at 1321, 1326, and *Brown*, Pet. App. 7a.

[7] In this respect Brown differs significantly from the plaintiff in *Fields v. Clark University*, 40 Fair Employment Practices Cases 670 (D. Mass. 1986), *rev'd on other grounds*, 817 F.2d 931 (1st Cir. 1987), upon which petitioners mistakenly rely for the proposition that Brown should have been reinstated without tenure. Pet. 19 n.16. In *Fields*, the district judge found direct evidence of discrimination; however, he did not grant tenure since he was not convinced that but for the discrimination the plaintiff would have been tenured. 40 F.E.P. at 672.

contract rather then tenure. When this offer was rejected by the department and Brown herself, the provost recommended that tenure be denied. *Id.* at 8a.

The case then went to a committee of three scholars expert in Brown's field from outside Boston University, who voted in favor of tenure by a vote of 2-1. *Id.* Under the tenure process in effect at Boston University, this committee of outside experts was only called upon in cases where the provost had declined to follow the uniform recommendation of the college and university-wide faculty committees. *Id.* It therefore functioned as an outside, impartial referee, although its recommendation did not bind the president or Trustees. Despite this committee's positive vote, the president recommended a denial of tenure, and later denied an appeal by Brown. The Trustees accepted his recommendation.[8] *Id.* at 10a. At trial, the president took the stand to justify his negative judgment. The jury ruled that the negative tenure decision constituted discrimination.

Unlike *Gutzwiller, Brown* is not fairly amenable to a remand to the university. The individual whose actions effected the discrimination, President Silber, remains as president. It would be futile to return Brown's case to him for reconsideration. *See Kunda v. Muhlenberg College,* 621 F.2d 532, 549 (3d Cir. 1980) (noting "the impossibility of asking the Board to ignore . . . the intangible effect upon [the tenure] decision because the candidate being considered was a successful party to a Title VII suit"). If

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[8] It was undisputed at trial that the Trustees invariably accept the president's recommendation. *See* joint appendix in the court of appeals at 457-58.

the president's vote were to be disregarded, the outcome would be a positive tenure award, based on the recommendation of the ad hoc committee at the penultimate level of review, which was consistent with all but one of the prior judgments in Brown's case.[9] Therefore, a further review would serve no purpose.

The Sixth Circuit in *Gutzwiller* stated that in most instances, courts should defer to the decision of "academic professionals." 860 F.2d at 1333. In Brown's case, the unbiased "academic professionals" had already spoken clearly and consistently prior to the court action.[10]

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[9] In this respect, the district court's award of tenure should more accurately be characterized not as an award imposed from outside, but as a judicial undoing of the acts of discrimination previously superimposed upon the institution's established process to reach the outcome that would have resulted absent the unlawful discrimination. *See Kunda v. Muhlenberg College*, 621 F.2d 532, 549 (3d Cir. 1980) ("the trial judge's finding [regarding the plaintiff's qualifications] was based not on his independent judgment, but on the judgment of the university community itself. . . . The court did not *award* Kunda tenure. The court instead attempted to place plaintiff in the position she should have been 'but for' the unlawful discrimination").

[10] Brown notes that, although the Sixth Circuit did not identify the "academic professionals" it had in mind, other courts, including this Court, have often referred to faculty as the individuals to whom courts should generally defer where academic judgment is at issue. *See, e.g., Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 225 (1985) ("judges . . . should show great respect for the faculty's professional judgment") (case involving evaluation and dismissal of student); *Namenwirth v. Board of Regents*, 769 F.2d 1235, 1243 (7th Cir. 1985), *cert. denied*, 474 U.S. 1061 (1986) (referring to the

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The Sixth Circuit's guidelines, which were crafted in response to a situation where the tenure review process had gone awry at the very earliest stage, cannot properly be applied as petitioner would have it, to deprive these professionals of their voice favoring tenure in the very different setting of Brown's case. Both because of the thoroughness of her tenure review prior to the discriminatory judgment, and because of the near-uniformity of support she received for tenure until that judgment,[11] Brown's is a case where the court's award of tenure is appropriate.

C. The Tenure Remedy is in Accord with Established Precedent

Given the particular factual background in *Brown*, it is hard to conceive of an appropriate remedy other than

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evaluation of tenure candidates by "an experienced faculty committee"); *Kunda v. Muhlenberg College, supra*, at 548 (" . . . faculty has at least the initial, if not the primary, responsibility for judging candidates"): *Johnson v. University of Pittsburgh*, 435 F. Supp. 1328, 1346 (W.D. Pa. 1977) (" . . . the peer review system has evolved as the most reliable method for promotion of the candidates best qualified to serve the needs of the institution").

[11] Petitioner contends that the Sixth Circuit's view would preclude a judicial award of tenure whenever "academic qualifications are fairly in dispute." Pet. 16-17. Nothing in *Gutzwiller* warrants this statement; the Sixth Circuit's guidelines turn solely on the likelihood of fair reconsideration. Even if the guidelines turned on whether a tenure candidate's qualifications were disputed, in the instant case, those evaluators who fairly evaluated Brown did not dispute her qualifications, notwithstanding petitioner's selective and distorted recitation of the contents of the tenure file.

tenure. The First Circuit considered and rejected alternatives suggested to it, noting that

> The University also argues that the special needs of academic institutions counsel imposition of less restrictive alternate remedies. However, the University suggests none. Some *amici* suggest that Brown be reinstated for a three year probationary period, or be subjected to a non-discriminatory tenure decision. Aside from the impracticality of the latter, well over eight years after the original decision, these suggestions fall far short of remedies which will make Brown whole. According to the jury's verdict, she was offered the three year extension *because* of discrimination. The jury found that, "but for" sex discrimination, Brown would immediately have been granted tenure. Awarding her tenure is the only way to provide her the most complete relief possible. *See Albemarle Paper Co.*, 422 U.S. at 421. Pet. App. 49a.

This result is in full accord with this Court's precedents. *Franks v. Bowman Transportation Co., supra.*

Petitioner also relies on *Ford v. Nicks*, 866 F.2d 865 (6th Cir. 1989), where, following *Gutzwiller*, the Sixth Circuit disapproved a district court's award of tenure to a faculty member who was not rehired after her first year of teaching because of sex discrimination. Even absent the guidelines of *Gutzwiller*, the court's ruling was proper, since the plaintiff had completed only one year of teaching, had not completed her tenure track probationary period, and had not undergone any portion of a tenure review. *Cf. Briseno v. Central Technical Community College Area*, 739 F.2d 344 (8th Cir. 1984) (tenure improperly awarded as remedy for discriminatory failure to rehire part-time faculty member as full-time employee;

court modifies relief to reinstatement in full-time probationary position). That tenure was an inappropriate remedy in two failure-to-rehire cases hardly proves that tenure is an inappropriate remedy on the very different facts of Brown's case.

The First Circuit's decision is unlikely to affect Title VII jurisprudence in the university context. Since 1972, when Title VII's coverage was extended to universities, only four plaintiffs have succeeded in proving that they were denied tenure because of unlawful discrimination.[12] Where the liability threshold is so high, the choice of remedy in a single case – within the range of the court's discretion – is unlikely to affect many individuals and does not warrant this Court's attention.

II. THE TENURE AWARD TO BROWN DOES NOT INFRINGE UPON ANY FIRST AMENDMENT RIGHT OF PETITIONER

Petitioner claims that by ordering tenure as a remedy, the First Circuit infringed on Boston University's First Amendment academic freedom right to determine whom to employ, and that the tenure remedy is not narrowly tailored to serve a compelling government interest. When petitioner made this argument below, the First Circuit

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[12] In addition to Brown and the plaintiffs in *Gutzwiller, supra,* and *Kunda, supra,* the plaintiff in *Planells v. Howard University,* 32 Fair Employment Practices Cases 336 (D.D.C. 1983), proved he was a victim of "reverse discrimination" in being denied reappointment and promotion to associate professor on the basis of his race. He was reinstated and promoted to associate professor with tenure pursuant to a consent judgment. 34 Fair Employment Practices Cases 66, 67 (D.D.C. 1984).

rejected the notion that legitimate academic judgments were involved in the denial of tenure to Brown, because the jury had found that Brown's tenure application had been denied because of her sex. Academic freedom is only at issue when a university bases its decision "on academic grounds," Pet. App. 48a, the court of appeals explained, and

> [a]cademic freedom does not include the freedom to discriminate against tenure candidates on the basis of sex or other impermissible grounds. *See Powell v. Syracuse University*, 580 F.2d 1150, 1154 (2d Cir. 1978). . . .While we have been and remain hesitant to interfere with universities' independent judgment in choosing their faculties, we have said that we will respect universities' judgment only "so long as they do not discriminate." App. 49a (citation omitted).

In the face of the First Circuit's clear and unexceptionable statement of the controlling legal principles, petitioner suggests that the law was somehow modified by *University of Pennsylvania v. E.E.O.C.*, ___ U.S. ___, 110 S.Ct. 577 (1990), because of a question purportedly left open there. Pet. 22. However, the matter of tenure as a remedy did not arise in *University of Pennsylvania*; much less was it left open. Rather, the clear rule that this Court established there is that universities will receive no special treatment when allegations of unlawful discrimination are involved: "The effect of the elimination of this exemption [for educational institutions from Title VII] was to expose tenure determinations to the same enforcement procedures applicable to other employment decisions." 110 S. Ct. at 583.

To the extent that petitioner's appeal to *University of Pennsylvania* can be understood as a request that the Court now define "the precise contours of any academic-freedom right against government attempts to influence the content of academic speech through the selection of faculty," *id.* at 586, that request should be rejected as inapposite to any question raised in this case. There has been no allegation here that the First Circuit's action in ordering tenure for Brown was intended to or would influence "the content of university discourse toward or away from particular subjects or points of view," *id.* at 587, or that it had any purpose other than to make Brown whole. As the Court pointed out in *University of Pennsylvania*, its concern in the seminal "academic freedom" cases was government attempts "to control or direct the *content* of the speech engaged in by the university or those affiliated with it." *Id.* at 586. It can just as fittingly be said of the First Circuit's tenure award as of the E.E.O.C.'s subpoenas of tenure documents that

> [the Court of Appeals] is not providing criteria that petitioner *must* use in selecting teachers. Nor is it preventing the University from using any criteria it may wish to use, except those – including race, sex and national origin – that are proscribed under Title VII. *Id.* at 587.

More to the point, even if, in the absence of discrimination, a university is deemed to have a First Amendment right to select faculty, the principle that government must narrowly tailor its action where it infringes upon an interest protected by the First Amendment does not apply where, as here, the asserted interest has been found to be a pretext for discrimination.

In short, nothing about this case raises any question not answered clearly and unequivocally in *University of Pennsylvania, supra*. A case which merely presents recently-visited legal issues in a slightly different but conceptually equivalent factual setting does not warrant this Court's review.

III. THE ISSUE OF A "BEYOND A REASONABLE DOUBT" HARMLESS ERROR STANDARD IN CIVIL CASES IS NOT PROPERLY BEFORE THE COURT AND DOES NOT WARRANT THIS COURT'S REVIEW

Petitioner next seeks review on the asserted grounds that this case raises an issue of whether a heightened harmless error standard should be applied to constitutional errors in civil cases, claiming that the court of appeals found constitutional error in this case; that the court found such error to be harmless under a civil preponderance of the evidence standard; and that this Court should review whether constitutional error in civil cases should be deemed harmless only when the court considers it so beyond a reasonable doubt.

Petitioner's argument fails. First, no issue regarding the harmless error standard was presented to or decided by the district court or the court of appeals. Petitioner's briefs to both lower courts – including its brief in support of its motion for judgment notwithstanding the verdict, its appeal, and its petition for rehearing – are wholly silent on this issue, citing only harmless error precedents from various courts of appeal which raise no question

about the standard to be applied.[13] *See* App. A-C. The issue was not raised below and consequently ought not to be heard for the first time here. *See, e.g., Berkemer v. McCarty*, 468 U.S. 420, 443 (1984); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n. 2 (1970).

Second, the premise for petitioner's argument is lacking: there has been no determination in this case that any error infringed petitioner's constitutional rights. Petitioner claims that the court of appeals found that it was an error of constitutional dimension to admit into evidence two remarks by University administrators, and that admitting the remarks into evidence violated petitioner's academic freedom. But this is not so. Rather, the court of appeals merely noted its "*fear* [of] the chilling effect that admission of such remarks *could* have on academic freedom." Pet. App. 27a (emphasis supplied).

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[13] The only references in the briefs below to harmless error do not discuss the issue of the harmless error standard at all. In petitioner's brief regarding its only post-trial motion relating to liability, its Motion for Judgment Notwithstanding the Verdict, harmless error is not mentioned. *See* Appendix A hereto. In petitioner's brief to the First Circuit (which substantially reproduced the JNOV memorandum on this issue), five pages are spent on the two purported errors now characterized as achieving constitutional dimension, but that discussion lacks any mention of the proper standard to be applied to harmless error analysis. *See* Appendix B hereto. Finally, in petitioner's Petition for Rehearing to the First Circuit, although petitioner goes into great detail regarding its disagreement with the court of appeals on the alleged errors in question, including an argument why the supposed errors are not harmless, the issue of the applicable standard is again conspicuously absent. *See* Appendix C hereto.

The court of appeals' prudential concern about potential curtailment of academic speech in the abstract does not constitute a finding that the admission of the evidence in fact deprived any defendant of academic freedom. This case thus contrasts sharply with those cases in which analysis of harmless constitutional error issues was successfully sought from this Court. *Cf. Chapman v. California*, 386 U.S. 18, 20-21 (1967) (Court found petitioner suffered denial of Fifth and Fourteenth Amendment rights at trial); *Rose v. Clark*, 478 U.S. 570, 575 (1986) (same). Indeed, petitioner itself claimed to the court of appeals no more than a risk that admission of the evidence would chill academic freedom.[14] *See* App. B.

In the absence of any determination that petitioner's constitutional rights were violated, there was no occasion for the lower courts to decide any question regarding the harmless constitutional error standard. Moreover, given that there has been no finding of constitutional error, there is no basis for this court to review the suppositional statements in the opinion of the court of appeals. *See Federal Communications Commission v. Pacifica Foundation*,

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[14] It is doubtful that a constitutional right is implicated here in any event. Petitioner asserted to the court of appeals that the evidentiary use of remarks by tenure evaluators would chill academic freedom by discouraging them from openly expressing their views on controversial subjects. App. B. There is no assertion here that there has been any direct attempt by the government to control the content of any speech, however, and petitioner's argument appears no different than the academic freedom claim rejected in *University of Pennsylvania v. E.E.O.C., supra*, 110 S.Ct. at 585-588, a decision which was not available to the court of appeals when it rendered its opinion in this case.

438 U.S. 726, 734 (1978) (Court reviews judgments, not statements in opinions).

Finally, the question whether a "beyond a reasonable doubt" standard should be applied to constitutional errors in civil cases is not a serious and important issue demanding this Court's review by certiorari. There is no split of authority between the circuits on this issue. Indeed, petitioners make no such claim. In fact, no court or commentator has intimated a view on this question, or so much as suggested that a heightened harmless error standard should be adopted regarding constitutional error in civil cases.[15] While it may be an interesting intellectual proposition, it is at best an academic query, not an important issue affecting other litigants or the public. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955) (certiorari not granted to satisfy intellectual interest in the abstract regarding episodic issues or questions which are not of significant general importance).

In short, on the question of the harmless error standard, the petition seeks to raise an issue which is not properly before this Court, does not legitimately arise

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[15] Petitioner claims that Professors Wright and Miller argue for the adoption in civil cases of the harmless constitutional error standard applied in criminal cases. In reality, the authors in 1973 no more than noted the possibility of such a development shortly after *Chapman v. California*, 386 U.S. 18 (1967), was decided. Neither at that time nor since has their treatise advocated any position on this issue. *See* 11 C. Wright and A. Miller, *Federal Practice and Procedure: Civil* (1973) § 2883. Aside from the reference to Wright and Miller, petitioner cites no other court or commentator that has discussed this issue; respondent is aware of none.

from the decisions below, and is not of such primacy to warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 24, 1990

APPENDIX A

EXCERPT FROM MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, FOR A NEW TRIAL (pp. 20-26)

A. Evidence of President Silber's views concerning the effect of working parents on the family should not have been admitted.

Over Boston University's objection (Tr. XII 70, 73, 76-77), Brown was permitted to introduce a segment of a 1984 speech given by President Silber in which he expressed various opinions about the decline of the family, including his views that "a single-parent family is likely to provide a far poorer environment for the initiation and sustenance of children," and that "in a two-parent family when both parents are at work there is less likelihood of providing an environment that encourages education – much less than in a two-parent family in which one parent remains at home for the nurture of the children, to devote himself or herself full time to their care, feeding and education." Pl. Ex. N. This evidence should have been excluded, pursuant to Fed. R. Evid. 401 and 403.

The Court admitted President Silber's remarks on the theory that they evidenced a "general atmosphere of discrimination."[3] (Tr. II 71-75). But as *Kumar* made clear,

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[3] The phrase "general atmosphere of discrimination" derives from *Sweeney v. Board of Trustees of Keene State College*, 604 F.2d 106 (1st Cir. 1979), *cert. denied*, 44 U.S. 1045 (1980). However, in *Hooker v. Tufts University*, 581 F.Supp. 98, 100 (D. Mass. 1985), Judge Nelson ruled that the concept refers to "general information about the *treatment* of women at the institution, in

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there "has to be a limit to reliance on pure atmospherics. We require, and are expected to require, evidence of discrimination that 'stands up in a court of law.' " 774 F.2d at 12. Not only were President Silber's remarks incapable of demonstrating a discriminatory attitude on his part, much less a "general atmosphere of discrimination" at Boston University, but such remarks were highly likely to confuse and mislead the jury.

President Silber's remarks on their face are gender-neutral. The remarks did not single out women – the "blame," according to President Silber for providing a less than ideal educational environment fell equally on both parents or on the single parent regardless of sex. Moreover, President Silber did not propose that women refrain from working in order to devote themselves full-time to the care of their children. On the contrary, he testified that his proposed solution was a dramatic improvement in government sponsored day care services. Only by indulging in speculation could a juror have inferred that President Silber's remarks revealed a hidden sexist agenda of impeding the access of women to the workforce. In short, the remarks were plainly irrelevant to the issue of whether President Silber sought to deny tenure to Brown because of her sex.

The admission of President Silber's remarks was highly prejudicial to the University. The views President

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order to suggest a discriminatory climate." *Id.* at 100 (emphasis added). Clearly, evidence of President Silber's *opinions* on the impact of working parents on child rearing does not bear on the *treatment of women at Boston University.*

Silber expressed are not universally shared. Some jurors, especially the female jurors, may well have interpreted his speech as an accusation that working women make inadequate parents, and thereby may have taken offense. Indeed, plaintiff's counsel thus interpreted the speech in her closing, arguing that President Silber

> bemoans the deterioration of three branches of society; the family, the church and the school. Who is to blame for the deterioration of the family? Well, women of course, single mothers and working mothers because mothers are out working instead of staying home with their children.

Tr. XIII 36.

The admission of evidence of a speech on unconnected policy matters for purposes of supporting a claim of discriminatory animus on the part of the speaker is particularly disturbing in the university context. One of the most important functions of a university is to foster a spirited and free-wheeling debate about controversial matters of moral and political concern. The role of university presidents, unlike their corporate counterparts, is integrally related to the fostering of this debate. *See Kunda v. Muhlenberg College*, 621 F.2d 532, 547 (3rd Cir. 1980). The admission as evidence of a speech concerning a debatable topic, purportedly to show an ideological taint, will necessarily discourage university presidents, other university officials, faculty members on tenure committees, and the myriad others who participate in tenure and promotion decisions from making any statement which, in another context – such as that of this case – may be viewed as insufficiently "progressive," or as unpopular with a particular audience. The risk of chilling such

speech, particularly in an academic setting, independently mandated the rejection as evidence of President Silber's remarks. *Cf. Redgrave v. Boston Symphony Orchestra*, 393 Mass. 93, 502 N.E.2d 1375 (1987) (suggesting that exercise of constitutional rights of free speech cannot constitute evidence of interference with the rights of another).

B. Evidence concerning the Women's Studies Program at Boston University should not have been admitted.

Again over Boston University's objection (Tr. IX 46), Brown introduced evidence that the University did not provide the degree of support for a Women's Studies Program that members of the Women's Studies Committee sought, and that Dean Bannister had "reservations about the academic orientation of women's Studies" (Pl. Ex. K). Brown did not contend that the level of funding for Women's Studies affected the University's need for her services.[4] Instead, Brown apparently sought admission of this evidence as a general indication of an institutional unresponsiveness to issues affecting women. This evidence, however, was not sufficiently related to Brown's tenure case to justify its admission, especially in light of its potentially prejudicial nature.

First, the fact that the advocates of a particular program desired greater funding for the program than it received proves nothing. The task of an administrator is

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[4] Such a contention would have been untenable, as Brown taught only one course which could be used to satisfy the Women's Studies minor.

to balance such claims on the University's limited resources against requests advanced with equal fervor by supporters of other programs. Secondly, even if the funding decision reflected Dean Bannister's reservations about the program's "academic orientation," such reservations simply do not translate into a hostility to female scholars themselves or a desire to limit their opportunities to pursue the fields of academic endeavor supported by the University. Congress has passed no law stating that universities must establish women's studies programs or must fund such programs at any particular level. Disagreements about the importance of particular courses or subjects simply do not illuminate the motives underlying a tenure decision. As stated in *Langland v. Vanderbilt University*, 589 F.Supp. 995, 1006 (M.D. Tenn. 1984) *aff'd without op.*, 772 F.2d 907 (6th Cir. 1985), which also involved claims of sex discrimination in the denial of tenure:

> Whatever the opinion of this or any other court may be as to the importance of women's studies to a college curriculum, it is not the judiciary's function to advise university officials what to teach. *See Lynn*, [656 F.2d] n.5, at 1343. *See generally Faro v. New York University*, 502 F.2d 1229 (2d Cir. 1974). An inference of discrimination may not be drawn from a judgment that one department or program is more deserving of funds than another, especially where, as here, there are insufficient resources to meet all the university's needs.

The proper approach to evidence of this type was taken in *Hooker v. Tufts University*, 581 F.Supp. 98 (D. Mass. 1983). *Hooker* involved a claim of sex discrimination in the denial of tenure to a female physical education

instructor who sought to introduce evidence of Tufts' failure to upgrade its physical education program as required by Title IX. Although the evidence sought to be introduced involved the failure to meet *statutory standards* of nondiscrimination in the *very* program in which the plaintiff sought tenure, the court held that the evidence was inadmissible, because the plaintiff established no "nexus between funding compliance and tenuring of women faculty." *Id.* at 102.

In the instant case, Brown established no nexus between the University's funding for Women's Studies and its tenuring of women faculty generally. Moreover, unlike the situation in *Lynn v. Regents of the University of California*, 656 F.2d 1337 (9th Cir. 1981), *cert. denied*, 459 U.S. 823 (1982), there was no evidence that the University's decision in Brown's particular case had anything to do with its level of support for the Women's Studies Program, a program with which Brown did not even purport to be identified. (Jt. Ex. 9xxxx). In these circumstances, evidence concerning the Women's Studies Program lacked any probative value. Nonetheless, its potential to confuse or mislead the jury on the narrow issue it was to decide is manifest, particularly in light of the Court's statement to the jury that it might be evidence "of a disdain on the part of the administration or disapproval of Women's Studies" (Tr. IX 78).

APPENDIX B

EXCERPT FROM BRIEF OF APPELLANT TRUSTEES OF BOSTON UNIVERSITY TO THE COURT OF APPEALS (pp. 40-44)

Over the University's objection and despite the District Court's expressed doubts about its relevance (App. 376-80) Brown introduced evidence that the CLA Dean had not provided the degree of financial support for a Women's Studies Program that a committee had sought,[28] and concerning which the Dean had written that he had "reservations" about its "academic orientation" (App. 383-86).

Significantly, Brown did not show, or even contend, that the level of Women's Studies funding in any way affected the University's need for her services. Hence, the Women's Studies evidence had no relevance whatsoever to the central issue in Brown's case – the reason why she was denied tenure. The fact that its advocates may have desired increased funding for a particular program proves nothing; for the task of a university administrator, as the District Court recognized (App. 379), is to balance claims on the University's limited resources against requests advanced with equal fervor by supporters of other programs. Nor did the Dean's "reservations" logically translate into either a general hostility to female scholars or an attempt to limit their opportunities. In short, disagreements about the importance of particular courses or

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[28] Nevertheless, Brown's witness acknowledged that CLA had approved, and was offering, Women's Studies as a minor program (App. 387).

subjects simply do not illuminate the motives underlying a tenure decision.

In *Langland v. Vanderbilt University*, 589 F.Supp. 995, 1006 (M.D. Tenn. 1984), *aff'd without op.*, 772 F.2d 907 (6th Cir. 1985), a case involving a claim of sex discrimination by a female professor who was denied tenure, the court, adverting to a university's academic freedom to determine what shall be taught (see, *supra*, n. 11), attached no weight to a "women's studies" contention similar to that made on Brown's behalf and said: "whatever the opinion of this or any other court may be as to the importance of women's studies to a college curriculum, it is not the judiciary's function to advise university officials what to teach. . . . An inference of discrimination may not be drawn . . . from a judgment that one department or program is more deserving of funds than another, especially where, as here, there are insufficient resources to meet all the university's needs." 589 F.Supp. at 1006. And see *Hooker v. Tufts University*, 581 F.Supp. 98, 102 (D. Mass. 1983), a Title VII case in which a female physical education instructor also challenged a tenure denial. There, the court excluded evidence showing that the university had underfunded its physical education department and had thereby failed to comply with Title IX of the Civil Rights Act. The evidence was excluded, the court explained because of its "weak probative value" and because there was no nexus between funding compliance and tenuring of women faculty."[29]

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[29] *Lynn v. Regents of the University of California*, 656 F.2d 1337 (9th Cir. 1981), *cert denied*, 459 U.S. 823 (1982), cited by

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In this case, too, the evidence concerning the Women's Studies program lacked probative value. The potential of this evidence to confuse or mislead the jury is manifest, particularly in light of the District Court's nebulous statement to the jurors that "the remoteness or pertinence of this particular line of inquiry is up to you to evaluate" (App. 389-90).[30]

C. President Silber's Remarks

Evidence of remarks by President Silber on three occasions was admitted over the University's objections

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Brown to the District Court in support of the admissibility of Women's Studies evidence (App. 377, 382), is clearly distinguishable factually. In *Lynn*, the female professor found to have been discriminatorily denied tenure had done a "study of French literature concentrat[ing] heavily on women's issues, and the testimony ruled admissible "revealed that the University's evaluation of Lynn's scholarship was due, in part, to its view that women's studies is not a substantial topic for scholarly work." 656 F.2d at 1343, and n.4. Thus the required "nexus" present neither in *Hooker supra*, nor in this case, was plainly present in *Lynn*.

[30] The District Court's full statement was (App. 389-90); "Now, again, members of the jury, we suddenly shifted as you might have noticed from the English Department to Women's Studies, and this is being offered to the extent that it shows evidence of a disdain on the part of the administration or disapproval of Women's Studies, and you may consider that to the extent that you think that it is relevant or dispositive in determining whether there was any sexual discrimination in the denial of tenure of Professor Brown, and while, well, the remoteness or pertinence of this particular line of inquiry is up to you to evaluate."

(App. 288, 310-13, 592-08, 510-11). This evidence should have been excluded under Rules 401 and 403, Fed. Rules of Evidence.

1. *The 1984 Talk*: In December 1984, Silber addressed a Freedoms Foundation Symposium on Citizen Responsibilities held in Washington, D.C. Silber's talk entitled "Citizen Responsibility: The Stewardship of Time", was included in a Freedoms Foundation booklet reflecting what Silber and others said at the Symposium (App. 508-09). In his address, Silber puts the blame on society for not providing an alternative nurturing system for children while their parents are working (App. 520-21). Over the University's objection, Brown singled out a small segment of Silber's address (App. 570-71) that utterly distorted the overall, philosophic viewpoint that Silber expressed. The segment introduced concerned Silber's statements that "a single-parent family is likely to provide a far poorer environment for the initiation and sustenance of children," and that "in a two-parent family when both parents are at work there is less likelihood of providing an environment that encourages education – much less than in a two-parent family in which one parent remains at home for the nurture of the children, to devote himself or herself full time to their care, feeding and education" (App. 509-10, 570-71).

Silber's latter remarks clearly had no connection with the basic issue in this case – why Silber and the University refused to tenure Brown. Accordingly, that the remarks should not have been admitted in evidence on grounds of irrelevancy seems remarkably clear – especially when one considers that Silber's remarks were

made in 1984, some three years after Brown was denied tenure.

The University necessarily was harmed by the admission of Silber's 1984 remarks into evidence. For only by an utter distortion of Silber's words, and by indulging in the wildest speculation, could it be inferred that Silber's remarks carried with them a hidden sexist agenda-possibly, one of impeding women's access to the workforce.[31] But this distorted view is precisely the connotation that Brown's counsel placed on Silber's words, and which, moreover, she pressed on the jurors in her closing argument.[32]

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[31] On their face, Silber's remarks – even the distorted segment introduced in evidence by Brown – are gender neutral: they do not single out women; they do not propose that women refrain from working in order to devote themselves full-time to the care of their children; they simply set forth the view that the nurturing of children at home, rather than elsewhere, provides a better environment for educational encouragement. By no stretch of the imagination, therefore, can it be said that Silber's remarks demonstrate a discriminatory attitude towards women; nor do they even remotely show a "general atmosphere of discrimination" at the University.

[32] There, Brown's counsel, referring to Silber's speech, stated to the jurors (App. 531):

> [President Silber] bemoans the deterioration of three branches of society; the family, the church and the school. Who is to blame for the deterioration of the family? Well, women of course, single mothers and working mothers because mothers are out working instead of staying home with their children.

There is yet another reason why evidence of President Silber's speech remarks should not have been allowed – the risk of chilling academic speech. One of the most important functions of a university is to foster a spirited and free-wheeling debate about controversial matters of moral and political concern (see *supra*, pp. 14-15, 27). The role of university presidents is integrally related to the fostering of this debate. *See Kunda v. Muhlenberg College*, 621 F.2d 532, 547 (3rd Cir. 1980). Hence, the admission into evidence of a speech by an academic concerning a debatable topic, purportedly to show an ideological taint, will necessarily discourage university presidents, faculty members, and other university personnel who participate in tenure and promotion decision from making any statement which in another context – such as that of this case – may be viewed as insufficiently "progressive" or unpopular with a particular audience. *Cf. Redgrave v. Boston Symphony Orchestra*, 399 Mass. 93, 502 N.E. 2d 1375, 1377 (1987) (suggesting that exercise of the constitutional right of free speech cannot constitute evidence of interference with the rights of another).

APPENDIX C

EXCERPT FROM PETITION FOR REHEARING OF APPELLANT TRUSTEES OF BOSTON UNIVERSITY, PRESENTED TO THE FIRST CIRCUIT COURT OF APPEALS (pp. 3-7)

1. The Cumulative Effect of the District Court's Erroneous Rulings on the Admissibility of Evidence Requires A New Trial.

In its Opinion, the Court ruled that the district court erroneously allowed Brown to introduce before the jury the following four items of evidence: . . . (3) evidence setting forth a portion of a 1984 speech by President Silber at a Freedom Foundation Symposium – evidence which, as the Court noted, was cited to the jury by Brown's counsel in closing argument; but which the Court characterized as a "red-herring", "far afield," "ambivalent," and "close to" zero relevance, and which the Court "fear[ed]" could have a "chilling effect" on academic freedom (Op. 34-35); and (4) evidence of a letter written by the Dean of CLA in which the Dean responded negatively to a request for funding of a Women's Studies Program – evidence which the Court viewed as lacking "any tendency to show a discriminatory animus against women," and which "worrie[d]" the Court "because of its effect on free speech in a university" (Op. 36-38).

Although this evidence was deemed by the Court to have been improperly admitted, the Court treated each item separately and in isolation, and in this manner concluded that none of the evidence prejudiced the jury. Thus, . . . the reproduction for the jury of the passage from President Silber's Freedom Foundation speech was

characterized by the Court as "regrettable" but not prejudicial error because, the Court thought, "it highly unlikely that these remarks, in a trial of this complexity and length, would have had an effect on the outcome" (Op. 35-36)[3]; and the admission of the Dean's Women's Studies letter was deemed to have been "harmless error" because, "in the context of this particular trial," the Court was "not persuaded that [the trial's] outcome was affected by the admission of this evidence" (Op. 38).[4]

Taken in isolation, any one of the four items of evidence erroneously admitted by the district court may not itself have been prejudicial enough to justify reversing the judgment. Taken cumulatively, however, the admissions necessarily had, we submit, a magnified impact and made a significant difference in the University's chances of persuading the jury that it did not discriminate against Brown. This is especially so in light of the fact that two of

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[3] Somewhat contradictorily, the Court stated in its evaluation of the Freedom Foundation speech: "While one would hope that jurors would see them for what they are, there is the danger such red-herrings, skillfully manipulated, could cause a jury to stray" (Op. 35).

[4] Unlike the erroneously admitted Craddock and Goodheart evidence, neither the Freedom Foundation evidence nor the Women's Studies evidence was "repetitive" or "substantially the same" as other evidence before the jury. Nor was the jury charged to ignore this evidence. Accordingly, the Court's view that the admission of the Freedom Foundation and Women's Studies evidence was harmless and non-prejudicial to the University is clearly open to dispute. Especially is this so with respect to the Freedom Foundation evidence which Brown's attorney emphasized in her closing statement to the jury.

the items erroneously admitted – the President's Freedoms Foundation speech and the Dean's Women's Studies letter – were adduced by Brown to show discriminatory attitudes towards women on the part of the two principal decision-makers on Brown's tenure request.[5] Thus, as Brown's presentation was obviously intended to bring about, the cumulative effect of the erroneously admitted evidence was to strengthen in the juror's minds a positive impression about Brown and a negative impression about President Silber and the CLA Dean: positive about Brown, because of her supposedly outstanding reputation beyond the Boston University campus and the supposedly high quality of the book she had produced; negative about the President and the Dean, because of the President's supposedly prejudiced statement against working mothers and the Dean's supposedly prejudiced veto of a course of study dealing with issues affecting women.

The principle that courts of appeals will consider and evaluate the cumulative effect of erroneous evidentiary rulings in both civil and criminal cases is well-established. See *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1105 (8th Cir. 1988); *Haskell v. Kaman Corporation*, 743 F.2d 113, 122 (2d Cir. 1984) (age discrimination case); *Fish v. Georgia-Pacific Corporation*, 779 F.2d 836, 840 (2d Cir.

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[5] The only other evidence adduced by Brown to show discriminatory animus were President Silber's two remarks in connection with Professor Costello's tenure candidacy – remarks that the Court deemed admissible, but as to which the Court said: "To be sure, it is a tremendous leap to infer from remarks such as these that President Silber denied Brown tenure because of her gender" (Op. 32).

1985); *McQuiston v. K-Mart Corporation*, 796 F.2d 1346, 1350 (11th Cir. 1986); *United States v. Soundingsides*, 820 F.2d 1232, 1243-44 (10th Cir. 1987), *rehearing den.* 825 F.2d 1468 (1987); *United States v. Wright*, 783 F.2d 1091, 1093 (D.C. Cir. 1986) *United States v. Rivera*, 490 F.2d 444, 448, 451 (5th Cir. 1974). This Court, too, has endorsed the principle. *Kassel v. Gannett Co., Inc.*, 875 F.2d 935, 953 (1st Cir. 1989); *Wells Real Estate v. Greater Lowell Bd. of Realtors*, 850 F.2d 803, 817 (1st Cir. 1988). And in most such cases, the application of the principle has resulted in the reversal of the outcome of the trial below: *Estes, supra; Haskell, supra; Fish, supra; Soundingsides, supra; Kassel, supra.*

Accordingly, we now ask, respectfully, that the Court consider and evaluate the cumulative effect on the University's substantial rights of the four items of inadmissible evidence here discussed. Thus considered, and for the reasons we have here set forth, the conclusion is inexorable, we submit, that the evidence was prejudicial to the University, and therefore that, to paraphrase the Court (Op. 20), the jury's verdict is "obviously" and "manifestly" unsupportable.